

TURNER BROTHERS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-316

Decided December 11, 1989

Appeal from a decision of Administrative Law Judge Frederick A. Miller (Docket Nos. TU 5-89-R and TU 6-6-R) affirming the issuance of Notice of Violation No. 85-03-006-035 and Cessation Order No. 85-03-006-021.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally

The Federal Register notice (49 FR 14674 (Apr. 12, 1984)) of the Secretary's decision to initiate Federal enforcement of the approved Oklahoma regulatory pro-gram effective Apr. 30, 1984, was in compliance with sec. 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982), which notice provision supersedes the more general rulemaking requirements of the Administrative Procedure Act.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

A notice of violation and cessation order will not be declared invalid because the permanent rather than interim regulations were cited, where conduct by an operator constitutes a violation of both permanent and interim regulations.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

At a hearing, OSMRE has the burden of going forward to establish a prima facie case as to the validity of the notice of violation by the submission of sufficient evidence to establish the essential facts of the violation. However, the ultimate burden of persuasion rests

with the applicant for review. If OSMRE establishes a prima facie case and the evidence is not rebutted, the evidence will sustain the violation.

APPEARANCES: Mark Secrest, Esq., Muskogee, Oklahoma, for appellant; Ralph O. Canady, Esq., Office of the Solicitor, Western Field Operations, Division of Surface Mining, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Turner Brothers, Inc. (Turner Brothers), has appealed a decision dated January 28, 1987, issued by Administrative Law Judge Frederick A. Miller, Docket Nos. TU 5-89-R and TU 6-6-R. Judge Miller affirmed the issuance of Notice of Violation (NOV) No. 85-03-006-035 and Cessation Order (CO) No. 85-03-006-021. He also found that the application of Oklahoma's Permanent Regulatory Program Regulations (OPRPR) was proper and that the Office of Surface Mining Reclamation and Enforcement (OSMRE) properly exercised jurisdiction to inspect the Turner Brothers' Muskogee No. 2A mine and to enforce Oklahoma's permanent program regulations at that mine.

Turner Brothers conducted mining operations at the Muskogee No. 2A mine under Oklahoma State Permit No. 80/81-3099 issued on December 14, 1981. On June 3, 1985, when Turner Brothers was in the reclamation phase of its operation, OSMRE Inspector Joseph Funk conducted an inspection of the minesite where he observed approximately 40 head of cattle grazing (Tr. 15). Following this inspection, Funk issued NOV No. 85-03-006-035 which cited Turner Brothers for a violation of 30 CFR 936 and OPRPR 816.115 (the permanent program regulations) because it had failed to obtain approval from the Oklahoma Department of Mines (ODOM) before grazing the reclaimed area. Funk set August 9, 1985, as the abatement date (Exh. R-1; Tr. 32). He returned to the site on July 8, 1985, and noted that the cattle were still present (Tr. 32, 33). During his third inspection on August 9, 1985, Funk observed that Turner Brothers had not abated the violation, but he modified the NOV to extend the abatement period from August 9 to September 3, 1985, to allow time for Turner Brothers to obtain a grazing permit from ODOM (Tr. 33, 34; Exh. R-5). On September 3, 1985, Funk returned to the site and issued CO No. 85-03-006-021 for failure to abate the violation (Tr. 34, 35; Exh. R-6).

Turner Brothers filed timely applications for review of the NOV and CO. The matter was set for hearing before Judge Miller on October 28, 1986, in Tulsa, Oklahoma.

The testimony at the hearing was summarized in Judge Miller's decision as follows:

Inspector Funk testified that he saw cattle grazing on the permit site on three separate occasions. Respondent introduced a photograph taken by Inspector Funk which shows cattle grazing on the permit site on June 3, 1985 (Exh. R-3). The inspector also testified that he determined that cattle were on the area that had been disturbed because he was able to distinguish the disturbed area from the undisturbed area based on differences in

the vegetation (Tr. 18, 26). He also stated that the approved post-mining land use for the site was pasture (Tr. 35).

Mr. Gregory G. Govier, former chief mining engineer at [Turner Brothers], testified on applicant's behalf. Mr. Govier stated that he had gone to the site approximately one week after [Turner Brothers] received the notice of violation from OSMRE, but that he did not see any cattle in the area (Tr. 50). Mr. Govier testified that he was familiar with the site, and disagreed with Inspector Funk's description of the angle at which the photograph of the cattle was taken. He stated that based on his estimation of the camera angle, the cattle were not in the area described by Inspector Funk, but he was not sure if the cattle were on disturbed or undisturbed area (Tr. 51, 52, 55; Exh. R-3). [Emphasis in original.]

(Decision at 2, 3).

In its posthearing brief, Turner Brothers argued that the Hearings Division of the Office of Hearings and Appeals (OHA) has no jurisdiction to hear this case due to a failure of OSMRE to comply with the notice provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553(d) (1982), so that OSMRE's takeover of the Oklahoma permanent program was void, leaving Oklahoma primacy to issue NOV's and CO's regarding alleged violations of Surface Mining Control and Reclamation Act of 1977 (SMCRA). Turner Brothers also argued that Permit No. 80/81-3099 is not subject to either the Federal or Oklahoma permanent rules and regulations and that OSMRE has no jurisdiction to issue NOV's and CO's based on these regulations. In response, OSMRE contended that Permit No. 80/81-3099 is a permanent program permit, and that cattle were grazing on Turner Brothers' minesite without permission from the regulatory authority.

Judge Miller concluded that OSMRE had presented a prima facie case which was un rebutted by Turner Brothers. He also found that Turner Brothers' arguments concerning the applicability of OPRPR and OSMRE's jurisdiction were without merit. Accordingly, he affirmed NOV No. 85-03-006-035 and CO No. 85-03-006-021, having concluded that they were validly issued.

In its brief on appeal, Turner Brothers reiterates its argument that OSMRE lacked jurisdiction to issue the NOV and CO because, when OSMRE assumed primary enforcement jurisdiction of surface coal mining operations in Oklahoma, it did not allow for proper notice under the APA. Specifically, Turner Brothers maintains that the Secretary's publication in the Federal Register of notice of his decision to assume primary enforcement jurisdiction over Oklahoma's surface mining program on April 12, 1984, with a stated effective date of April 30, 1984, violated the APA, which requires a hiatus of 30 days between the publication date and the effective date of a "rule." Therefore, according to Turner Brothers, the Federal takeover of Oklahoma's surface mining regulatory program was void, leaving OSMRE without authority to issue the NOV and CO and OHA without jurisdiction to review their propriety.

In response to the jurisdictional argument, OSMRE relies on the Board's decisions in Turner Brothers, Inc. v. OSMRE, 93 IBLA 194 (1986), and Turner Brothers, Inc. v. OSMRE, 92 IBLA 381 (1986), which held that the notice published in the Federal Register on April 12, 1984, constituted adequate public notice for the beginning of Federal enforcement pursuant to section 521(b) of SMCRA, 30 U.S.C. § 1271(b). OSMRE also referred to State of Oklahoma v. Hodel, filed in the U.S. District Court for the Western District of Oklahoma (No. 84-1212-A), in which the court found that SMCRA had its own administrative procedure for initiation of direct enforcement efforts and that OSMRE complied in full with section 1271(b) of SMCRA.

[1] In reviewing the jurisdictional argument, we note that this issue has been addressed by the Board in the context of several other appeals emanating from Federal enforcement of the Oklahoma program. In Turner Brothers, Inc. v. OSMRE, 99 IBLA 349 (1987), the Board summarized our past holdings:

Turner Brothers' arguments regarding jurisdiction and OSMRE's response thereto are identical to those addressed by this Board in Turner Brothers, Inc. v. OSMRE, 92 IBLA 381 (1986) (Turner Brothers I). Therein we held that "the notice OSM published in the Federal Register, [49 FR 14674 (Apr. 12, 1984),] constituted adequate public notice for the beginning of Federal enforcement pursuant to section 1271(b) of SMCRA." [1/] Id. at 388.

Moreover, as we noted in Turner Brothers, Inc. v. OSMRE, 98 IBLA 395 (1987) (Turner Brothers II), this issue was also addressed by the United States District Court in Oklahoma v.

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1/ The "takeover" provision, section 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982), provides as follows:

"Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this chapter, the Secretary shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with requirements of this chapter, and may issue such notices and orders as are necessary for compliance there-with: Provided, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this chapter before suspending or revoking the State permit."

Hodel, Civ. No. CIV-84-1202-A (W.D. Okla. Dec. 3, 1985). In rejecting an identical challenge to the assumption of direct Federal enforcement by OSMRE, the court declared that the "self-contained administrative provisions in SMCRA govern this case, overriding [the] APA" and held that OSMRE had properly followed the procedures set forth in 30 U.S.C. § 1271(b) (1982). Turner Brothers' jurisdictional argument must be rejected.

Id. at 351. We therefore reject the argument that OSMRE was not authorized to issue Turner Brothers this NOV and CO and that OHA is without jurisdiction to hear Turner Brothers' appeal.

[2] Turner Brothers also contends that Permit No. 80/81-3099 is not subject to either the Federal or Oklahoma permanent rules and regulations and that OSMRE has no jurisdiction to issue a violation based on these regulations.

In order to discuss this issue it is necessary to understand the chronology of events preceding the adoption of Oklahoma's permanent program. On December 3, 1980, an Oklahoma State court entered a temporary restraining order whereby ODOM and other non-Federal defendants were enjoined from taking any further action to submit, or resubmit, to the Department of the Interior any part of the Oklahoma permanent plan for surface mining control and reclamation or any other program other than the interim rules currently being enforced, until further order of the court (SOR Exh. 2 at 1). The State court further enjoined defendants from enforcing any permanent program provision that controverted or violated any of the interim rules currently being enforced under the Oklahoma interim program (SOR Exh. 2 at 2). Oklahoma Mining & Reclamation Ass'n v. The State of Oklahoma, No. CJ-80-5520 (D. Oklahoma County, Oklahoma).

On December 23, 1980, the State court issued a permanent injunction against defendants whereby they were ordered to withdraw the proposed regulations of ODOM as submitted to OSMRE and rewrite them. The court also enjoined the defendants from enforcing the regulations in the form they had been submitted to OSMRE and ordered them to enforce the laws and regulations presently in effect (SOR Exh. 3 at 1-2).

On January 9, 1981, the State court dissolved the permanent injunction ordering the withdrawal and rewriting of the proposed permanent regulations. However, the State court issued a new temporary injunction which simply prohibited the defendants from enforcing such proposed permanent regulations of ODOM as might be approved by OSMRE, until further order of the court. The State court ordered the defendants to continue to administer and enforce their current interim regulatory program until further order of the court (SOR Exh. 4 at 2). Oklahoma's permanent program was conditionally approved by the Secretary of the Interior on January 19, 1981 (46 FR 4910).

However, on February 12, 1981, the Oklahoma House of Representatives adopted House Resolution No. 1009 whereby the permanent rules were disapproved (SOR Exh. 5). Subsequent to this resolution the defendants submitted a motion to dissolve the temporary injunction as moot (SOR Exh. 6). By Journal Entry dated July 20, 1981, the State court ordered dismissal of the lawsuit (SOR Exh. 7).

More than a year later, on April 2, 1982, the Oklahoma legislature approved the permanent program regulations.

Turner Brothers asserts that the effect of the temporary restraining order entered on December 3, 1980, was to leave intact the interim rules and regulations in Oklahoma at that time. Further, Turner Brothers contends that the effect of the legislative disapproval of the permanent regulations on February 12, 1981, was to render them null and void, leaving the State with no legal authority to enforce them. Under Turner Brothers' theory, permit No. 80/81-3099 (which was issued on December 14, 1981) was submitted, reviewed by ODOM, and issued prior to the time the permanent rules and regulations became effective in Oklahoma.

OSMRE asserts that the Oklahoma permanent regulations do apply to permit No. 80/81-3099, because, it argues, Oklahoma's permanent program was effective as of January 19, 1981, the date it was approved by the Secretary. In the Federal Register Notice of January 19, 1981, the Secretary noted that, according to the terms of the temporary injunction issued on December 2, 1980, by the State court in Oklahoma Mining & Reclamation Ass'n v. The State of Oklahoma, *supra*, the interim program would remain in effect unless the temporary injunction were terminated within 1 year of issuance. Thus, the Secretary stated that, in the event of termination of the injunction, the permanent program would immediately become effective (46 FR 4910 (Jan. 19, 1981)). OSMRE asserts that this is what occurred when the temporary injunction was dissolved by the State court on July 20, 1981. Thus, OSMRE contends that the permanent program was therefore implemented effective July 20, 1981, and argues that Turner Brothers' permit was issued under the permanent program on December 14, 1981. 2/

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2/ Turner Brothers disagrees with OSMRE's position that all permits issued after the July 20, 1981, State court order dismissing the law suit were permanent program permits subject to permanent program regulations, arguing that, under Oklahoma law, the first possible date the permanent rules and regulations could have come into effect in Oklahoma would have been during the first 60 calendar days of a subsequent legislative session, or January 1982. Turner Brothers disputes OSMRE's assertion that the State court's vacating its injunction freed the way to consider the permanent regulations approved, arguing that the injunction was not lifted based on any judicial intent to enforce the permanent rules in Oklahoma. Rather, it contends, the injunction preventing the implementation of the permanent rules was vacated as moot because no State agency could enforce a law specifically rejected by the State legislature. Furthermore, Turner Brothers asserts that, in view of the rejection of the permanent program regulations by the Oklahoma legislature, the Department has no authority to implement this law or require Oklahoma to enforce it, contending that the permanent program was unenforceable under 30 U.S.C. § 1253(b)(4) (1982), which provides that the Secretary shall not approve any State program until the State has the legal authority to enforce those standards.

OSMRE responds to Turner Brother's argument that the permanent program did not become effective until Apr. 2, 1982, by reference to the Director's Findings published on Apr. 2, 1982, at 47 FR 14152 through 14157. Specifically, OSMRE points out that the title to the Federal Register announcement

It is unnecessary to resolve this question, as, even assuming arguendo that Turner Brothers is correct that it was not properly covered by the permanent program, it would not prevail in challenging the validity of the NOV and CO at issue here. <sup>3/</sup> Turner Brothers argues that the NOV and CO here should be regarded as void because they were issued by OSMRE under the permanent program regulations, which (according to Turner Brothers) did not apply to this permit. However, in making this argument, Turner Brothers overlooks the fact that even if the permanent program did not apply, the interim program remained in effect. Further, it is clear that Turner Brothers' conduct here violated both the relevant interim and permanent program standards.

OPRPR 816.115 provides as follows: "When the approved postmining land use is range or pasture land, the reclaimed land may be used for livestock grazing at a grazing capacity approved by [ODOM] approximately equal to that for similar non-mined lands \* \* \*." Environment Reporter, 3 Mining 1681:0567. The interim regulation governing postmining use for grazing, 30 CFR 715.20(e)(2), which OSMRE did not cite, but which, under Turner Brothers' theory applies to it, provides as follows:

Livestock grazing will not be allowed on reclaimed land until the seedlings are established and can sustain managed grazing. The regulatory authority, in consultation with the permittee and the landowner or in concurrence with the governmental land managing agency having jurisdiction over the surface, shall determine when the revegetated area is ready for livestock grazing.

Under both regulations, the regulatory agency, whether OSMRE (under the interim program) or ODOM (under the permanent program) must approve the capacity of livestock grazing prior to the initiation of grazing. We have expressly held that the interim program regulation, 30 CFR 715.20(e)(2), requires that no grazing may take place until OSMRE has approved it. Lone Star Steel v. OSMRE, 98 IBLA 56, 62 (1987). Consistent with our reading of 30 CFR 715.20(e)(2), we also read OPRPR 816.115 as providing that no grazing may take place until ODOM has approved it. <sup>4/</sup>

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fn. 2 (continued)

states "Approval of Oklahoma's Permanent Regulatory Program Amendment and Director's Findings on the Status of the Oklahoma Permanent Regulatory Program." (Emphasis added.) OSMRE concludes that it is clear that this announcement concerns approval of an amendment to the program and not approval of the permanent program itself.

<sup>3/</sup> We note that Judge Miller did hold that the permanent program regulations properly applied in this case. We perceive no need to review this holding in these circumstances.

<sup>4/</sup> The record indicates that, consistent with our interpretation, OSMRE believed that, under the permanent program regulation, a "grazing plan" had to be approved by ODOM prior to allowing cattle to graze on disturbed areas (Tr. 36).

Unrebutted testimony by the OSMRE inspector indicates that, even as late as the hearing date, no request to allow grazing had been approved by ODOM (Tr. 36) and nothing in the record shows that OSMRE granted such approval. The interim regulation and the permanent program regulation both require approval from the appropriate regulatory authority before grazing can be initiated following mining. Turner Brothers failed to secure such approval before grazing was initiated. Thus, regardless of which regulation applies, Turner Brothers' conduct in allowing grazing on the disturbed portion of the site constituted a violation.

In sum, since its action was a violation of both the relevant interim and permanent program standards, one of which necessarily applied to its mining activities, Turner Brothers suffered no adverse consequences from OSMRE's citation of the permanent program standards, even if erroneous. See Island Creek Coal Co., 2 IBSMA 125, 87 I.D. 304 (1980).

[3] Thus, we affirm Judge Miller's ruling that OSMRE properly issued the contested NOV and CO. At a hearing OSMRE has the burden of going forward to establish a prima facie case as to the validity of an NOV by the submission of sufficient evidence to establish the essential facts of the violation. 43 CFR 4.1171. However, the ultimate burden of persuasion rests with the applicant for review. 43 CFR 4.1171(b). If OSMRE establishes a prima facie case and the evidence is not rebutted, the evidence will sustain the violation. Tiger Corp., 4 IBSMA 202, 89 I.D. 622 (1982); James Moore, 1 IBSMA 216, 86 I.D. 369 (1979).

OSMRE established a prima facie case in support of the NOV and CO. Turner Brothers did not present evidence sufficient to rebut this case. See Turner Brothers v. OSMRE, 103 IBLA 124 (1988). On appeal, Turner Brothers has raised no objection to Judge Miller's ruling that OSMRE properly issued the contested NOV and CO other than its jurisdictional challenge and its argument as to whether the interim or permanent program regulations apply. Therefore, we affirm Judge Miller's ruling that the NOV and CO were validly issued.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the decision appealed from is affirmed.

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David L. Hughes  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge